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No. 81-5713

IN THE

Supreme Court of the United States

October Term, 1981

BRYANT R. BRITT,

Petitioner,

vs.

SIMI VALLEY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

Respondents' Brief in Opposition to the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

McKAY AND BYRNE, and
SPRAY, GOULD & BOWERS,
By LINDA L. HAMLIN,
3250 Wilshire Boulevard,
Suite 603,
Los Angeles, Calif. 90010,
(213) 386-6900,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Statement of Facts.

As pointed out in the decision of the Court of Appeals: (1) petitioner filed a notice that he would not oppose the subject motion to dismiss (Respondents' Appendix A, at p. 2, lines 7-9) and (2) petitioner failed to object in any manner to the recommended order of dismissal in the District Court proceedings below. (Respondents' Appendix A, at p. 2, lines 13-15.)

Further, as the Court of Appeals noted, and petitioner admits: (1) the school board notified him on April 29, 1979 that a board meeting would be held to discuss his dismissal and that he could attend with counsel or a union representative (Respondents' Appendix A, p. 1 at lines 27-30; Petition p. 3, n.5); (2) he subsequently received a notice of intention to dismiss unless he filed for a hearing (Respon-

dents' Appendix A, p. 1 at lines 30-32; Petition p. 3, n.5); (3) he filed for a hearing which was set for July 3, 1975 (Respondents' Appendix A, at p. 1, lines 32-33; Petition, p. 3, n.6); and (4) he resigned from his teaching position *prior* to the date set for the hearing. (Respondents' Appendix A at p. 2, line 1; Petition at p. 3, n.7.)

ARGUMENT.

I.

Petitioner Consented to the Entry of the District Court Order of Dismissal.

Petitioner filed a *notice* that he would *not oppose* the subject motion to dismiss. (Respondents' Appendix A at p. 2, lines 7-9.)

As this Court asserted in an analogous context in *Ackerman v. United States*, 340 U.S. 193, 198 (1950):

> ". . . Petitioner made a considered choice not to appeal, . . . His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, . . . There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

Further, petitioner disregarded the clear admonition contained in the Magistrate's Report and Recommendation of dismissal, served on December 17, 1980, that:

> "Any party . . . shall, not later than 10 days after service upon him, file and serve a written statement of objections . . . Failure to so object within the time limit specified shall be deemed a *consent* to the recommendation . . ." (Emphasis added — LLH.)

Petitioner failed to file any objections and this case was dismissed on March 5, 1981. (Respondents' Appendix A at p. 2, lines 10-15.) As the Court in *G. K. Properties v. Redevelopment Agency of the City of San Jose*, 577 F.2d 645, 648-649 (9th Cir. 1978), asserted in pertinent part:

> "Since this objection to the dismissal was not asserted below, it may not be raised for the first time on this appeal." (Citations omitted.)

* * *

Absent an earlier objection . . . we cannot say that the district court erred in dismissing the action . . ."

See also *Wellman v. Jellison*, 593 F.2d 876, 879 (9th Cir. 1979);

Smith v. Stone, 308 F.2d 15, 17 (9th Cir. 1962); and

Link v. Wabash, 370 U.S. 626, 639-642 (1962).

II.

Petitioner Failed to Raise Any of the Questions Presented in His Petition in the District Court Below.

The instant case raises no question warranting review by this Court. The entire Petition is completely devoid of any issues that were advanced in the District Court below.

As this Court held in *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1976):

". . . Not having been raised in the District Court, that issue is not before us."

See *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2;

Irvine v. California, 347 U.S. 128, 129.

See also *United States v. Lovasco*, 431 U.S. 782, 788 n.7 (1976).

Moreover, in defiance of the Revised Rules of the Supreme Court of the United States, Rule 21(h), petitioner has failed to specify the manner in which or the stage of proceedings in either the court of the first instance or the appellate court at which the alleged federal questions were raised. The conclusion to be drawn from petitioner's avoidance of Rule 21(h) is that petitioner cannot demonstrate that any of the presently alleged federal questions was timely and properly raised so as to give this Court jurisdiction.

III.

Contrary to Petitioner's Contention, There Is No Conflict Between the Ninth Circuit Court of Appeals' Decision Herein and the Cases Cited in the Petition.

As this Court stated in *National Labor Relations Board v. Pittsburg Steamship Co.*, 340 U.S. 498, 502:

> ". . . Certiorari is granted only . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Layne v. Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38(5)."

Petitioner relies upon two decisions (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718 (2nd Cir. 1969) (incorrectly cited by petitioner) and *Cornist v. Richland Parish School Board*, 448 F.2d 594 (5th Cir. 1971)) to support the basis of his Petition that the decision below "is in conflict with other circuits of the Court of Appeals on the same matter." (Petition, p. 1.)

However, petitioner's reliance upon *Bivens, supra*, is misplaced. The decision originally rendered by the Second Circuit Court of Appeals was *reversed* by this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1970).

Further *Bivens*, unlike the instant case, involved an action allegedly arising out of an unreasonable search and seizure committed by federal agents in violation of petitioner's Fourth Amendment Rights. As this Court asserted at page 397:

> "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury . . . Having concluded that petitioner's complaint states a cause of

> action under the Fourth Amendment . . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."

Petitioner herein has never raised any question even remotely similar to the issue addressed by this Court in *Bivens*; thus, petitioner's claim that *Bivens* is in conflict with the decision in the instant case lacks merit.

Petitioner's reliance upon *Cornist v. Richland Parish School Board*, is also misplaced. *Cornist* involved an action by a teacher who charged that her employment had been unlawfully terminated. The district court found that plaintiff's dismissal was based on causes other than desegregation and dismissed the complaint for lack of jurisdiction. The Fifth Circuit Court of Appeals noted that a hearing was conducted to consider the Superintendent's recommendation that the appellant be dismissed and the board subsequently voted to terminate her services.

In contradistinction to the facts in *Cornist*, the petitioner herein demanded a hearing but admittedly *resigned* from his teaching position *prior* to the scheduled hearing.

Even assuming, *arguendo*, that this Court concludes that the facts are indistinguishable, there is no real conflict between *Cornist* and the decision in the instant case.

In *Cornist*, at page 596, the Court pointed out:

> "The only issue before us is whether under 42 U.S.C. §1983, a person who alleges a violation of civil rights under color of state law must exhaust existing *state court remedies* prior to prosecuting an action in federal court." (Emphasis added — LLH.)

The issue of exhaustion of state *administrative* remedies, as distinct from state judicial remedies, was never presented or decided in *Cornist*.

Petitioner herein never raised any issue of exhaustion of state judicial and/or administrative remedies in the District Court proceedings below.

Similarly, contrary to the residual contention arising by inference from the Petition, there is no real conflict between the decision rendered in the instant case and the decisions of this Court in the two remaining cited cases, *Monroe v. Pape*, 365 U.S. 167 (1961) and *Damico v. California*, 389 U.S. 416 (1967).

Monroe involved an action arising out of an alleged unreasonable search and seizure conducted by police officers in petitioner's home. This Court focused upon the meaning of the "under color of" state law provision in the Civil Rights Act, 42 U.S.C. §1983. The primary issue presented was whether plaintiff's complaint stated a cause of action even though defendant police officers acted without any authority under state law.

Petitioner in the instant case has never raised any question similar to the principal issue addressed by this Court in *Monroe*. Further, the issue of exhaustion of state administrative remedies was not before this Court in *Monroe*.

Damico, supra, involved an action by welfare recipients attacking the constitutionality of state welfare laws.

In contrast to the facts in *Damico*, petitioner in the instant case has never challenged the constitutionality of any California state law and/or regulation at any stage of the proceedings. Indeed, as the Ninth Circuit pointed out in its decision herein, petitioner did not even attempt to challenge the adequacy of the review procedure in the district court below and thus the Court of Appeal found no compelling reason to consider it for the first time on appeal. (Respondents' Appendix A at p. 2, lines 30-31 and p. 3, line 1.)

Petitioner's solitary attempt herein to set forth any facts to establish the alleged inadequacy is that "the appellant did not feel that the hearing could be fair." (Petition, p. 3, n.7.) This bare conclusionary allegation simply lacks merit.

Finally, petitioner has not and cannot frame any viable argument that the decision rendered by the Ninth Circuit Court of Appeals herein was incorrect and/or unsupported by other Ninth Circuit Court of Appeals decisions. *Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Whitner v. Davis*, 410 F.2d 24, 28-29 (9th Cir. 1969).

Conclusion.

For the reasons expressed herein, it is respectfully submitted that petitioner's request for the issuance of a writ of certiorari be denied.

Respectfully submitted,
McKAY AND BYRNE, and
SPRAY, GOULD & BOWERS,
By LINDA L. HAMLIN,
Attorneys for Respondents.

APPENDIX A.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Bryant R. Britt, Plaintiff-Appellant, vs. Simi Valley Unified School District: John W. Duncan; George Hawkins; Robert Marcus; Allen Jacobs; Kenneth Ashton; Frederick Riess; Viola Brooks; Lewis Roth; Stephen Hogg; Sandra Binns; Helen E. Carrico; and David McCamy, Defendants-Appellees. No. 81-5284, D.C.—#77-4091-WPG(K)

Submitted: March 1, 1982, Decided: ..., 1982.

Filed March 4, 1982.

Appeal from the United States District Court for the Central District of California, District Judge William P. Gray, Presiding.

Before: WRIGHT, ALARCON and REINHARDT, Circuit Judges.

Bryant Britt was employed as a tenured science teacher by the Simi Valley, California Unified School District from 1964 to 1975. During that time, a number of complaints concerning Britt's behavior were lodged by students, parents, teachers and administrators. After several meetings between Britt and the school's administrators, the school district issued a "Notice of Unprofessional Conduct and Imcompetency" on December 17, 1974.

On April 29, 1975 the school board notified Britt that it would consider his dismissal at its next meeting and that he could attend with counsel or a union representative. Britt appeared and the board voted to dismiss him. He was given notice that the dismissal would take effect in 30 days unless he petitioned for a review hearing. Britt requested a hearing, and one was set for July 3, 1975 before a three-person panel.

Britt resigned his position on June 13, 1975. On November 1, 1977 he sued the school district and its officials, seeking relief under several sections of the Civil Rights Act, the U.S. Constitution and various California statutes. The defendants moved to dismiss for failure to state a claim upon which relief could be granted. Britt responded with an ambiguous "Notice of Plaintiff that he will not Oppose Defendant's Motion to Dismiss his Complaint."

On December 17, 1980, a Magistrate's Report and Recommendation concluded that Britt's decision to resign and terminate the administrative proceedings foreclosed a Civil Rights Act suit. The parties were given 10 days to file objections. Britt did not respond, and the suit was dismissed on March 5, 1981.

On appeal Britt notes correctly that several Courts of Appeals have held that exhaustion of state administrative remedies is not required before bringing a civil rights suit. *See generally, Hochman v. Bd. of Ed. of the City of Newark*, 534 F.2d 1094, 1097 (3d Cir. 1976). This court, however, has held that exhaustion is required where a teacher receives notice of dismissal for a future date and adequate administrative remedies are available to forestall the deprivation of his or her civil rights. *Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Whitner v. Davis*, 410 F.2d 24, 28-29 (9th Cir. 1969).

The review panel had authority to set aside Britt's pending dismissal but Britt resigned before the scheduled date of review. He did not challenge the adequacy of the review procedure in the district court and we find no compelling reason to consider it for the first time on appeal.

The judgment is AFFIRMED.